

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID P. VAN DEUSEN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Syracuse, N.Y.

*Docket No. 95-2864; Submitted on the Record;
Issued September 25, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$3,507.18 was created during the period May 18, 1991 to December 11, 1993 due to the failure to withhold health benefit premiums; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required repayment by deducting \$50.00 every 4 weeks from continuing compensation.

In the present case, the Office accepted that appellant sustained a back strain in the performance of duty on March 27, 1991.¹ Appellant began receiving compensation for temporary total disability and was placed on the periodic rolls commencing May 18, 1991. The record indicates that the Office did not withhold any amount for health benefits coverage.

By letter dated January 6, 1994, the Office advised appellant that a preliminary determination had been made that an overpayment of \$3,507.18 had occurred during the period May 18, 1991 to December 11, 1993. The Office indicated that health insurance deductions had not been made during this period. With regard to fault, the Office found that appellant was without fault in creating the overpayment. The Office advised appellant that he could request a waiver of the overpayment and enclosed a questionnaire regarding appellant's financial situation.

In a decision dated June 6, 1995, the Office finalized the overpayment determination. The Office indicated that \$50.00 would be withheld from appellant's continuing compensation to repay the overpayment.

The Board has reviewed the record and finds that the Office properly found that an overpayment of \$3,507.18 was created.

¹ Appellant had a previous employment injury and was working light duty at four hours per day.

In this case there does not appear to be any dispute that deductions for health insurance were not taken from appellant's compensation payments during the period May 18, 1991 to December 11, 1993. The computer records indicate no deductions were made and no contrary evidence was submitted. An employee is responsible for payment of the employee share of the cost of enrollment for health benefits coverage, and there was no indication that appellant had elected to cancel enrollment.² The Board therefore finds that an overpayment was created in this case. For the period May 18, 1991 to December 11, 1993, the Office calculated that the amount of the overpayment was \$3,507.18.³

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act⁴ provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁵ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth, respectively, in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent).⁶ Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if: the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

² See *Leticia C. Taylor*, 47 ECAB ____ (Docket Nos. 93-2421 and 94-304, issued November 28, 1995).

³ The Office deducted \$135.24 from the overpayment amount to reflect prior deductions for health benefits on August 27 and October 22, 1989.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8129(b).

⁶ To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; see *Robert E. Wenholz*, 38 ECAB 311 (1986).

With respect to the submission of financial evidence, the Office's regulations provide in pertinent part:

"In requesting waiver of an overpayment, either in whole or in part, the overpaid individual has the responsibility for providing the financial information described in § 10.322 [pertaining to waiver of the grounds that recovery would defeat the purpose of the Act], as well as such additional information as the Office may require to make a decision with respect to waiver. Failure to furnish the information within 30 days of request shall result in denial of waiver, and no further requests for waiver shall be entertained until such time as the requested information is furnished."⁷

In this case, appellant was advised of the need to submit financial information, but there is no indication that any relevant financial information was submitted prior to the June 6, 1995 decision.⁸ Since appellant did not submit the necessary information, the Board finds that the Office properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act. With respect to whether appellant relinquished a valuable right or changed his position for the worse, appellant did not offer any argument or evidence that would establish that the overpayment would be against equity and good conscience.

The Board further finds that the Office properly required repayment by deducting \$50.00 from appellant's continuing compensation.

Section 10.321 of the Office's regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."⁹

When an individual fails to provide requested information on income, expenses, and assets, the Office should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹⁰ The Board finds that the Office did not abuse its discretion in requiring repayment by deducting \$50.00 every 4 weeks from continuing compensation.

⁷ 20 C.F.R. § 10.324.

⁸ Appellant asserted that financial information was submitted at the employing establishment, but there is no indication that appellant properly submitted any financial information to the Office. The January 6, 1994 notice provided both an address for the regional Office as well as for the Branch of Hearings and Review.

⁹ 20 C.F.R. § 10.321.

¹⁰ *Gail M. Roe*, 47 ECAB ____ (Docket No. 94-764, issued December 12, 1995).

The decision of the Office of Workers' Compensation Programs dated June 6, 1995 is affirmed.

Dated, Washington, D.C.
September 25, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member